

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEVIN BOWMAN : CIVIL ACTION
v. : NO. 99-4652
MARTIN DRAGOVICH, *et al.*, :

MEMORANDUM

BUCKWALTER, J.

January 18, 2001

Magistrate Judge Thomas J. Rueter filed his Report and Recommendation on October 23, 2000, to which timely objections were filed by Petitioner. His memorandum in support of these objections was filed on December 12, 2000.

I have undertaken a *denovo* review of this case and conclude that the Report and Recommendation of Judge Rueter should be approved.

The specific objections of Petitioner are as follows:

1. The Petitioner objects to the magistrate judge's consideration of only two instances of prosecutorial misconduct in support of the claim of violation of due process on the ground of prosecutorial misconduct, as the magistrate's report notes that proceedings in state court raised a "multitude of specific allegations of prosecutorial misconduct." All of these instances of prosecutorial misconduct support the claim.

2. The petitioner objects to the magistrate judge's rejection of the claim of denial of due process as a result of repeated instances of prosecutorial misconduct. Petitioner was denied a fair trial as a result of a pattern of egregious and prejudicial remarks by the prosecutor in this case.

3. The petitioner objects to the magistrate judge's conclusion that there was no prima facie showing of racial discrimination in the exercise of peremptory challenges, as well as the magistrate judge's conclusion that racially neutral reasons were offered for the prosecutor's peremptory challenges.

4. The petitioner objects to the magistrate judge's conclusion that there was no ineffective assistance of trial or appellate counsel in this case, because:

a. the jury should have been instructed that they were to draw no adverse inference from the fact that petitioner did not testify at trial;

b. the jury should have been properly instructed about Pennsylvania law governing the responsibility of an accomplice for the act of the principal in a first degree murder case.

Before discussing the objections, it should be noted that they are essentially a restatement of Petitioner's original grounds for relief in his habeas corpus petition filed on September 16, 1999. Unlike the petition, the objections have, ultimately, been accompanied by a brief.

Thefactualandproceduralbackgroundissetforthingreatlengthinpages1 through8ofJudgeRueter’sReportandRecommendationandwillnotberestatedherein butisadoptedbyreferencethereto.

Objectionsoneandtwoaresimilarandwillbediscussedasone;namely, didtherepeatedinstancesofallegedprosecutorialmisconductdenyPetitionerafairtrial. Inhisbrief,Petitioner’scounselstatedthatthefocusofhisargumentinthisregardison twothemes:

(1)smearingpetitionerwithprejudicialevidenceofothercrimeswhich werenotproventobeconnectedtothechargedoffense;and

(2)impropervouchingduringclosingargument.

Counseldoesmaintainhispositionthattheentirerecordisrelevanttotheclaimof prosecutorialmisconduct.

Specificallyasto(1)above,Petitionerreferstothefollowingstatement madebytheAssistantDistrictAttorney(ADA)inhisopenings;referringtoJuniorBlack Mafia(JBM)Leader,“Bucky”:

Sometimesonesectionofthecitywouldaskanothersectionofthecityto doafavorforthem.Thatis,southwestPhiladelphia,BuckyDavismight askthisdefendant,Bowmantokillsomebodyforhim.Andthenhewould oweafavor,whichtheywouldreturn.

PetitionerarguesthattheADANeverprovedthisassertionandknewhe couldnot.This isnotcorrect.Thestatementsof oneDarryl Woods,admittedinto evidencebythetrialcourt,supportthisstatementbytheADA.AsMagistrateJudge

Rueter points out in footnote 4 of his opinion, these statements by Woods were correctly admitted into evidence in compliance with Pennsylvania law.

As to the improper vouching during closing argument, the particular statement Petitioner objects to is as follows:

Now ladies and gentlemen, if you think I am saying that these detectives haven't made mistakes, they couldn't... they are human beings like you and me, detectives are just like anybody else, you have good ones, you have bad ones. They are not of the same talents, they do the best job they can, they don't get up there and lie.

Magistrate Judge Rueter carefully reviewed this remark in the context of the entire trial and his conclusion that these remarks did not result in a denial of Petitioner's right to a fair trial is supported in the record of the case.

Objection number 3 raises a Batson issue (Batson v. Kentucky, 476 U.S. 79 (1986)), objecting to Judge Rueter's conclusion that there was no *prima facie* showing of racial discrimination and that racially neutral reasons were offered for the prosecutor's peremptory challenges.

It appears in this case that the Petitioner, who is black, was tried by an all-white jury with one alternate being black. I say it appears because even that is not totally clear from the record. The black alternate juror did testify at a post-trial hearing that the jury was all white. The murder victim's mother and her daughter testified that more than one black person served on the jury. In any event, no record was made by trial counsel as to how many members of the cognizable racial group were in the venire panel or the race of any of the potential jurors stricken by the Commonwealth or the defense. It was only

at a post-conviction hearing that an attempt was made to reconstruct what happened at the original voir dire. Voter registration records of 13 of the 16 jurors struck by the Commonwealth showed 2 Black, 3 B's, 1 Br, 3 Brown, 1 White, 1 C, and 2 with no race stated. From this evidence, Petitioner states at page 5 of his brief, "thus, the record flatly contradicts the trial judge's assertion, cited and relied upon by the Magistrate Judge, that only two of the prosecutor's sixteen peremptory challenges were exercised against African-Americans." That statement is not entirely accurate. The record reflects an uncertainty of the race of the prospective jurors, specifically showing only two people who identified themselves as "black" on their voter registration card to have been struck by the Commonwealth.

In any event, both counsel cite a series of Third Circuit cases citing five factors the trial court should assess whether a defendant has established a *prima facie* case. According to Judge Higginbotham, those factors include:

- (1) how many members of the "cognizable racial group" are in the venire panel;
- (2) the nature of the crime;
- (3) the race of the defendant and the victim;
- (4) a pattern of strikes against black (or other cognizable racial group) jurors in a particular venire; and
- (5) a prosecutor's questions and statements during the selection process.

Jones v. Ryan, 987 F.2d 960 (3d Cir. 1993).

Judge Rueter correctly noted that the number of African-Americans in the venire panel (1) above, is not known; the nature of the crime (2) was one apparently drug related having no racial motivation; the race of the victim and the defendant (3) was African-American; and no allegation has been made (4) that the prosecutor made statements or asked questions that suggested a discriminating interest or purpose.

Even assuming that Petitioner has shown a pattern of strikes against African-Americans, Judge Rueter found that Judge Poserina, the Court of Common Pleas trial judge, correctly concluded that the prosecutor did not intentionally discriminate against any potential juror citing Hernandez v. New York, 500 U.S. 352, 364 (1991) for the deference afforded a trial court in this situation.

As to Petitioner's final objection regarding ineffective assistance of appellate counsel, I find the Report and Recommendation to have carefully and correctly analyzed Petitioner's objection, which are without merit.

Petitioner has failed to demonstrate that a reasonable jurist would find Judge Rueter's assessment of the constitutional claims debatable or wrong. Thus, in denying the petition, the court will also decline to issue a certificate of appealability since there has been no substantial showing of a denial of a constitutional right. Slack v. McDaniel, 120 S.Ct. 1595, 1604 (2000).

An order follows.

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ORDER

AND NOW, this 18th day of January, 2001, upon careful and independent consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter, and the objections filed thereto, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The Petition for a Writ of Habeas Corpus is DENIED.
3. A certificate of appealability is not granted.

BY THE COURT:

RONALD L. BUCKWALTER, J.